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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	
TELEPHONE AND DATA SYSTEMS, INC.	)	CC Docket No. 94-11
	)	
For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B in Market 715, Wisconsin 8 (Vernon), Rural Service Area Market No. 715	)	File No. 10209-CL-P-715-B-88

To: Honorable Joseph P. Gonzalez
Administrative Law Judge

REPLY TO OPPOSITION TO
MOTION TO ENLARGE ISSUES

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September 7, 1994

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THE SETTLEMENT GROUP,[1] by its attorney, respectfully replies to the Opposition to Motion to Enlarge Issues filed by Telephone and Data Systems, Inc. (TDS) and United States Cellular Corporation (USCC) on August 25, 1994.[2] The Settlement Group respectfully submits that the Opposition is fundamentally wrong, both on the material facts and the governing law, and should be rejected as meritless. In reply thereto, the Settlement Group respectfully shows:

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[1] Century Cellunet, Inc., Contel Cellular, Inc., Coon Valley Farmers Telephone Company, Inc., Farmers Telephone Company, Hillsboro Telephone Company, LaValle Telephone Cooperative, Monroe County Telephone Company, Mount Horeb Telephone Company, North-West Cellular, Inc., Richland-Grant Telephone Cooperative, Inc., Vernon Telephone Cooperative and Viroqua Telephone Company.

[2] The Settlement Group is aware that the Common Carrier Bureau has obtained an extension until September 21, 1994 in which to file a reply herein, but believes the record would benefit from filing this reponse prior to the Bureau's submission.

BACKGROUND AND SUMMARY

In its Motion to Enlarge Issues, the Settlement Group requested the addition of a lack of candor and misrepresentation issue against TDS concerning its relationship to UTELCO, Inc. during the application proceedings in Wisconsin 8 in this case. Based upon information disclosed in internal TDS company directories, it appears that TDS, at a minimum, lacked candor concerning its relationship to UTELCO when it elected to stonewall the issue in the face of the Common Carrier Bureau's explicit finding that TDS did not control UTELCO. Moreover, TDS did more than merely stonewall the issue. Instead, it went on to affirmatively represent that TDS held merely a "minority [i.e., non-controlling] interest" and to repeatedly characterize the relationship in similar terms, thereby expressing overt agreement with the Bureau's finding that TDS did not control UTELCO.

TDS[3] now argues against the Settlement Group's motion to enlarge, employing three main themes: First, TDS claims that it never made affirmative representations in its pleadings concerning control of UTELCO, and that the Settlement Group's argument now is inconsistent with its prior pleadings in this regard. Second, TDS claims that the Commission ultimately found that the issue of TDS control was irrelevant to the cross-ownership issue raised by the Settlement Group in its protest, and, therefore,

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[3] Although USCC joined in the opposition pleading, its conduct has not been directly implicated in the matters at issue in the motion to enlarge. Therefore, the Settlement Group will refer only to TDS in the balance of this reply.

that the motion to enlarge is merely an improper attempt to have the Presiding Judge reconsider an adverse determination of the Hearing Designation Order (HDO). Finally, TDS claims that the directories cited by the Settlement Group are not probative on the issue of TDS control of UTELCO because (a) the 1990 directory also has a listing for Volcano Telephone Company under the heading "TDS Operating Telephone Companies," and because (b) UTELCO is not listed under any of the regions in the section headed "TDS Service Organizations".

As shown in more detail below, TDS' arguments rest upon misstatements of -- or failure to acknowledge -- relevant facts and a gross misconception of the governing law. TDS both sets up a straw man and is disingenuous when it denies that it ever represented to the Commission that it did not control UTELCO. It is enough that TDS merely remained silent on the control issue (which TDS now freely admits that it did), since the Bureau's decision in the case explicitly made the question of control a fact of decisional significance. Even if TDS only stonewalled on the issue, as it now admits, that is enough to establish prohibited lack of candor because both its general duty of candor and Section 1.65 of the rules required an affirmative disclosure of all relevant information on the control issue.

In actual fact, of course, TDS did more than merely stonewall; it affirmatively represented to the Commission in various ways that it was merely a "minority," i.e., non-controlling, interest holder in UTELCO. Of equal or greater importance, TDS'

opposition actually reveals even more damning information that counsels strongly in favor of granting the Settlement Group's motion. A fair reading of the Naftalin Declaration shows that there were additional material facts bearing on the control issue which were known to TDS at the time its pleadings were filed, which, if disclosed on the record, would have made it clear that there were substantial indicia of control by TDS of UTELCO. TDS thus elected to stonewall the control issue in order to avoid designation of its application for evidentiary hearing and consequent dismissal of its application.

Stated another way, TDS' opposition papers clearly acknowledge its motive for deception, viz., avoiding a hearing on the issue of control and consequent dismissal of its application.

It is also quite besides the point that the Commission eventually determined that the issue of TDS' control of UTELCO did not implicate the Commission's ultimate construction of its cross-ownership prohibition. Contrary to TDS' interpretation, the Settlement Group reads the Hearing Designation Order as continuing to rely on TDS' supposed lack of control of UTELCO in its disposition of the Section 1.65 issue raised by the Settlement Group. However, even if TDS is correct in its interpretation, the short answer to its argument is that the law does not "countenance willingness to mislead simply because there is no evidence that the Commission was in fact misled".[4]

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[4] RKO General, Inc. v. FCC, 670 F.2d 215, 231 (D.C. Cir. 1981), cert. den. 456 U.S. 927 (1982).

Finally, the factors cited by TDS concerning its internal directories, properly analyzed, actually strengthen the normal inference that UTELCO's listing is an indication of TDS control. While Volcano is listed in the 1990 directory (and only in the 1990 directory)[5] under the heading "TDS Telephone Operating Companies" (as is UTELCO), Volcano is not listed under the "TDS Company Master List," as UTELCO is, nor is it assigned a TDS "Company Number," as UTELCO also is. The normal inference, therefore, is that at the time the 1990 directory was published, TDS continued to consider UTELCO as being firmly in the family fold, but not so at the time in the case of Volcano. This interpretation is fully consistent with the facts surrounding TDS' dealings with Volcano, as discussed below.

Moreover, TDS failed to point out that other companies besides UTELCO and Volcano are listed under the heading "TDS Operating Telephone Companies" but not under one of the regions under the heading "TDS Service Organizations". This fact fully refutes TDS' suggestion that the omission of UTELCO from the regional listing somehow speaks to the issue of its control by TDS.

In summary, the Bureau's decision in this case incontrovertibly created a duty on TDS' part to make a full and candid disclosure concerning its relationship to UTELCO. TDS now admits that it did not do so, but elected to stonewall the issue in-

[5] Volcano's single listing in 1990 contrasts with UTELCO's repeated listing in the 1987 through 1990 directories.

stead. In point of fact, even its belated admission is inadequate, because TDS actually made affirmative representations supporting the Bureau's finding that TDS did not control UTELCO. TDS' opposition papers also reveal that TDS was worried at the time that if it addressed the control issue, it would have to reveal additional information that could cause its application to be designated for hearing and consequently dismissed. Its acknowledged motive to deceive through its stonewalling and false representations thus completes all the essential elements of a candor and misrepresentation violation.

The Presiding Judge has been charged with conducting a wide-ranging investigation into the propriety of TDS' representations and related conduct in the La Star proceeding, and substantial time and resources have already been expended by the parties to comply with the Commission's directive. Against this background, the Settlement Group respectfully submits that the course now required in the public interest is to make certain that a full evidentiary record is developed on all pertinent matters bearing on TDS' fitness to be a licensee in Wisconsin 8, and not to limit the inquiry on the basis of artful pleadings by the applicant. Accordingly, the motion to enlarge should be granted.

REPLY ARGUMENT

1. The Motion to Enlarge Does Not Depend Upon Whether or Not TDS Expressly Represented to the Commission that TDS Did Not Control UTELCO.

TDS spends much of its opposition papers arguing that it never expressly represented to the Commission that it did not

control UTELCO, and that the Settlement Group's motion is inconsistent with its earlier pleadings in this case. However, TDS' argument in this regard is directed toward a straw man.

At the outset, it is useful to reiterate the nature of the offenses alleged in the Settlement Group's motion to enlarge. It is well settled that:

> Misrepresentation and lack of candor can ... be distinguished in their manifestations: the former involves false statements of fact, while the latter involves concealment, evasion, and other failures to be fully informative. But both misrepresentation and lack of candor represent deceit; they differ only in form.

Fox River Broadcasting, Inc., 93 F.C.C. 2d 127, 129 (FCC 1983). (Emphasis added).

Stated somewhat differently, the offense of lack of candor turns "not so much [on] what [TDS] said as what it had failed to say." RKO General, Inc. v. FCC, supra, 670 F.2d at 229. (Emphasis added).

The gravamen of the Settlement Group's motion to enlarge is that TDS failed to candidly disclose the relevant facts concerning its relationship with UTELCO after the Common Carrier Bureau issued its decision relying in substantial part on its finding that TDS did not control UTELCO. In this regard, it plainly does not matter at all whether TDS affirmatively and explicitly represented that it did not control UTELCO, or whether it merely stonewalled on the issue. In either case the deceit -- i.e., the

failure of TDS to be "fully informative" -- constitutes an offense requiring addition of the requested issue.[6]

Similarly, it plainly does not matter at all whether TDS thought then (or continues to think) that the control issue is irrelevant. Rather, the decisive consideration is that the Bureau -- the actual decisionmaker in the proceeding -- thought that the question of control was material to one or more of the issues it decided.

Since the Bureau deemed the issue to be material, TDS was legally obligated to be fully candid in its subsequent pleadings concerning its relationship to UTELCO. By its own admission, TDS was not candid; instead, by its own admission, it elected to stonewall the issue.

Furthermore, characterizing what TDS did as merely stonewalling is not really fair, although as discussed above its silence is enough of an offense by itself. Rather, TDS plainly made affirmative representations in various ways that it had merely a "minority" -- i.e., non-controlling -- interest or

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[6] This also disposes of TDS' companion claim of an inconsistency between the Settlement Group's prior pleadings and its motion to enlarge. In the pleadings referenced by TDS, the Settlement Group argued -- correctly -- that the Bureau's finding that TDS did not control UTELCO was "entirely unsupported in the record" and was contrary to inferences normally drawn from the facts already known about the relationship between TDS and UTELCO. The Settlement Group plainly had no knowledge, and did not address, the issue raised here, viz., whether TDS was withholding information from the Commission or affirmatively lying to the Commission about the relationship between TDS and UTELCO. Moreover, the cross-ownership issue raised by the Settlement Group did not depend upon TDS' affirmative control of UTELCO; which is why the issue was not directly addressed prior to the Bureau's decision.

ownership position in UTELCO. In the face of the Bureau's order, such representations were tantamount to affirmative representations by TDS that indeed it is true that TDS does not control UTELCO. Accordingly, TDS is wrong on both counts -- not only did TDS make affirmative representations concerning its control of UTELCO, contrary to its argument now, but even if it had not, its failure to disclose the relevant facts is sufficient standing alone to require addition of the issue requested in the motion to enlarge.

2. TDS' Opposition Rests Upon Fundamental Misconceptions Concerning the Law Governing Misrepresentation and Lack of Candor.

Various threads runing through TDS' opposition papers demonstrate that its opposition also is founded upon a palpably erroneous view of the law governing lack of candor and misrepresentation matters. Perhaps most significantly, TDS trumpets that the Commission ultimately found that the control question was "not germane" to the cross-ownership issue raised by the Settlement Group and, hence, that the motion to enlarge is merely an improper attempt to reconsider an issue decided adversely to the Settlement Group by the HDO.

As a preliminary matter, the Settlement Group disagrees with TDS' view that the HDO did not rely upon the Bureau's (evidently erroneous) finding that TDS did not control UTELCO.[7] Again, however, it does not matter either way, because:

[7] See TDS Opposition at p. 12 & n. 8 (disputing that the Commission at ¶ 5 & n. 5 of the HDO adopted the Bureau's finding on control for purposes of its § 1.65 ruling).

> The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones. We do not think it is an answer to say that the deception was unnecessary and served no purpose.

FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946).

Similarly, the Commission "cannot countenance willingness to mislead simply because there is no evidence that the Commission was in fact misled." RKO General, Inc. v. FCC, supra, 670 F.2d at 231. In short, even if TDS correctly argues that the control issue ultimately was held in the HDO not to be germane to the outcome of the case, that fact should not and properly does not immunize TDS from scrutiny on whether it engaged in misrepresentations or lacked candor concerning its control of UTELCO.

Another thread in TDS' argument is to the effect that it properly could decide whether or not to address the control issue, i.e., that it had no legal duty to address the control question.[8] That argument is palpably false.

It has long been settled that § 1.65 of the rules requires an applicant to inform the Commission of all relevant facts that may be of decisional significance concerning an application, whether such information is expressly called for by the particular application form or not. RKO General, Inc. v. FCC, supra, 670 F.2d at 229; Southern Broadcasting Co., 38 F.C.C.2d 461, 464 (Rev. Bd. 1972).

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[8] See TDS Opposition at p. 15 ("TDS ... was under no obligation to raise the issue of control of UTELCO, to take a position on the control of UTELCO, or to join in a dispute with the Settlement Group on that issue").

The Presiding Judge does not have to decide whether the Settlement Group's pleadings by themselves elevated the control question to a matter of decisional significance, because the incontrovertible fact is that the Bureau's decision explicitly did so. At that point, i.e., when the Bureau issued its decision, TDS had the legal duty to speak fully and candidly to the control question. It plainly did not do so: it admits instead to stonewalling; but in actuality it went beyond stonewalling and made affirmative representations having the effect of ratifying the Bureau's (evidently erroneous) findings that TDS lacked control of UTELCO.[9]

3. TDS' Opposition Papers Reveal Additional Significant Information Dictating that the Issue Requested by the Settlement Group be Added.

Moreover, the opposition papers reveal far more damning information on the control issue which underscores the need to add the issue requested by the Settlement Group. At the time of the application proceedings, the Settlement Group knew that TDS owned 49% of UTELCO and had the option to acquire the remaining 51%. See Motion to Enlarge at p. 4. In addition, however, TDS' opposition papers demonstrate that (a) 42.75% out of the remaining 51% of the voting stock (about 84%) was beneficially owned by employees of TDS (19 employees at 2.25% each); (b) TDS also had

[9] It likewise is entirely unavailing that the lack of candor or misrepresentations were in the form of pleadings by counsel rather than statements under penalty of perjury by principals of TDS. See, e.g., RKO General, Inc. v. FCC, supra, 670 F.2d at 231 (calculated omissions in legal pleadings still constitute prohibited lack of candor).

acquired additional non-voting stock which gave it a majority equity interest in UTELCO, even if not an overt majority voting interest; (c) the President, Secretary, Treasurer and four of the eight directors of UTELCO were actually TDS employees although never identified as such until now; and (d) the business address for UTELCO's 100% holding company, Monroe Communications Corporation, actually is the address of a TDS Service Department, although again it was never identified as such until now.[10]

These facts had to have been known to TDS at the time of the Bureau's decision, and they are substantial indicia of TDS control of UTELCO in their own right.[11] Moreover, a fair reading of the Naftalin declaration is that TDS was worried at the time that disclosing all of the relevant facts concerning TDS' relationship to UTELCO would have or could have resulted in TDS' application being designated for evidentiary hearing on the

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[10] See TDS Opposition at p. 13 & n. 10; p. 16 & n. 14. The address in Madison, WI acknowledged by TDS as one of its corporate addresses is the same address listed for Monroe Communications Corporation, UTELCO's 100% holding company, in the Form 430 attached to the original petition to deny herein. Petition to Dismiss or Deny, File No. 10209-CL-P-715-B-88, July 27, 1989, at Attachment B & Exhibit VIII. Again, however, the TDS address was not identified as such until now and can be discerned as such only by review of the information disclosed for the first time in the various internal TDS directories which are the basis of the Settlement Group's motion to enlarge.

[11] In fact, the Settlement Group would argue that wholly independent of TDS' substantial stock ownership interest in UTELCO, its appointment of its employees to the positions of President, Secretary, Treasurer and 50% of the positions on the Board of Directors gave it at least negative control over UTELCO, which was enough by itself to render erroneous the Bureau's findings concerning TDS' alleged lack of control over UTELCO.

control issue and consequently dismissed as defective.[12] TDS' opposition papers thus clearly demonstrate its motive for deceiving the Commission in this case -- i.e., avoiding the delay and expense of an evidentiary hearing and ultimately dismissal of its application as defective.

In short, the additional material facts disclosed in TDS' opposition papers unambiguously demonstrate at least negative control of UTELCO by TDS, contrary to the Bureau's decision, as well as TDS' clear motive for deception on the control issue. The papers themselves thus confirm and underscore the need to add the misrepresentation and lack of candor issue requested by the Settlement Group.

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[12] Naftalin admits that "numerous facts and circumstances occurr[ed] over a number of years which might be relevant to any determination of the locus of de facto control of UTELCO" and that the issue of control "would require a full investigation and presentation of all the factors". Naftalin Declaration at p. 3. In other words, TDS worried that a candid disclosure on the control issue likely would have resulted in designation of its application for evidentiary hearing on the control question and consequent dismissal of the application as defective by reason of TDS' control over UTELCO. While Naftalin "take[s] full responsibility" for the decision not to make a candid disclosure on the control question (id.), he carefully avoids addressing whether the decision to do so was discussed with and approved by principals or employees of TDS. In any event, of course, TDS is responsible for tactical decisions made by its counsel no less than decisions made by its officers or other employees. See, e.g., RKO General, Inc. v. FCC, supra, 670 F.2d at 231 ("In modern America, parties communicate with administrative agencies almost exclusively through lawyers, but this is all the more reason why we cannot assume that RKO did not know what its lawyers were saying").

4. Properly Analyzed, the Factors Cited by TDS Actually Support the Inference that UTELCO's Listing in the Internal Directories Is an Indication of Control.

Finally, there remains to be considered the significance of the fact that the 1990 directory also has a listing for Volcano Telephone Company under the heading "TDS Operating Telephone Companies," and that UTELCO is not listed in any of the directories in any of the regions under the heading "TDS Service Organizations". TDS argues that these factors demonstrate that UTELCO's listings are not probative on the issue of TDS control. See TDS Opposition at pp. 15-18. Again, however, TDS offers up only an incomplete and misleading analysis; properly analyzed, these factors tend to underscore the normal inference that UTELCO's listing is evidence of its control by UTELCO.

As a preliminary matter, the Settlement Group points out that it no longer matters whether the internal directories bear on the question of control or not. This is so because, as demonstrated in the previous section, the other information in TDS' opposition papers by itself establishes ample basis for adding the requested issue wholly independent of the information in the directories. Therefore, extended analysis of the directories themselves is unnecessary.

As a second preliminary matter, the Settlement Group objects in its entirety to the argument of TDS concerning the significance of the directories. The rules explicitly require that, except for matters of which official notice may be taken, assertions of fact in oppositions to motions to enlarge "shall be

supported by affidavits of a person or persons having personal knowledge thereof." 47 C.F.R. § 1.229(d). TDS makes various representations of fact concerning the directories which are not subject to official notice, but which are not supported with affidavits or declarations as required by the rules. Therefore, TDS' entire argument concerning the directories at pp. 15-18 of its opposition papers is entitled to no weight whatsoever.

Even if it is considered, proper analysis supports the conclusion that the listing of UTELCO is an indication of control by TDS. Volcano is listed only in the 1990 directory, but is not listed in the "TDS Company Master List" in that directory, nor is it given a TDS "Company Number" in that directory. UTELCO, by contrast, is listed in the 1987 through 1990 directories and is listed in the "TDS Company Master List" and given a TDS "Company Number" (i.e., 271).

The directories evidently are published around the beginning of the calendar year for use during that year.[13] The transaction between TDS and Volcano transpired in October 1989 when certain Volcano stock was transferred to TDS and TDS agreed to purchase other stock upon receipt of regulatory approval of the transaction.[14] TDS thereupon filed applications with the Commission on

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[13] The 1989 directory, e.g., has a "Corrections and Additions" dated 3/1/89 (Bates No. TDS02784), which suggests that it was originally published around the beginning of 1989.

[14] Attached hereto is an unpublished court decision from the dispute over Volcano which recites the pertinent facts relating to TDS' various attempts to negate certain Volcano stockholders' right of first refusal.

or about December 7, 1989 in File Nos. 21481-CD-TC-01-90, 13222-CF-TC-(2)-90 and W-P-C-6545 for consent to acquire control of Volcano. Although TDS ultimately lost the litigation over control of Volcano, it appeared at the time the 1990 directory was published that only ministerial tasks remained to be accomplished before Volcano was officially a part of the TDS corporate family. Under these circumstances, inclusion of UTELCO in the directories for several years running does indeed support the normal inference that its listing is an indication of TDS control.

Moreover, while TDS trumpets that UTELCO is not listed in one of the regions under the heading "TDS Service Organization (see TDS Opposition at p. 17), it neglects to point out that four other companies similarly are listed in the same directory under the heading "TDS Operating Telephone Companies" but not in a region under the heading "TDS Service Organizations". They are Happy Valley Telephone Company, Anderson, CA (Bates No. TDS03135); Hornitos Telephone Company, Hornitos, CA (Bates No. TDS03137); Island Telephone Company, Chesaning, CA (Bates No. TDS03137); and Winterhaven Telephone Company, Winterhaven, CA (Bates No. TDS03165).

The Settlement Group understands TDS to be claiming that Volcano was the only listed company during this period (besides UTELCO) in which TDS held less than an overt majority of voting stock. Therefore, since four other companies presumably overtly controlled by TDS are likewise omitted from a regional listing,

the failure to also list UTELCO in a region obviously does not speak to the issue of TDS control of UTELCO.[15]

It is also noteworthy that Volcano is not listed in the 1990 directory under the heading "TDS Company Master List;" nor is it assigned a TDS "Company Number". UTELCO is, by contrast, which is yet another indication that TDS considered UTELCO to be firmly in the family fold during the period 1987 through 1990, while Volcano was not. Again, proper analysis of the information of the directories supports the Settlement Group's motion herein and undercuts TDS' claims.

CONCLUSION

The Presiding Judge has been charged by the Commission with conducting a wide-ranging investigation into TDS' candor and truthfulness in the La Star proceeding, and with determining whether TDS is qualified to be a Commission licensee in Wisconsin 8. In addition to its conduct in La Star, there is now overwhelming -- indeed, perhaps even conclusive -- evidence that TDS also misled the Commission in the Wisconsin 8 proceedings themselves with respect to the relationship between TDS and UTELCO -- an issue that the Common Carrier Bureau explicitly deemed to be of decisional significance.

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[15] In fact, the Settlement Group is informed, and on this basis believes, that the listing in the region simply relates to the manner in which the company is locally managed and not to the issue of control by TDS. Similarly, while TDS also includes information in its opposition concerning the need for REA approval of the local manager, TDS' point in doing so is unclear, since local management is by no means synonymous with "control".

Given the sensitivity and overriding importance of this issue, the Settlement Group respectfully submits that by far the better course is to develop a full evidentiary record on this issue, as well as the already desigated issues, and to decide the public interest on the basis of the facts and not merely on the basis of artful pleadings by TDS. Accordingly, the Settlement Group respectfully submits that the course of action properly required in the public interest is to add the issue requested in the motion to enlarge to the ongoing evidentiary hearings.

Respectfully submitted,

CENTURY CELLUNET, INC.
CONTEL CELLULAR, INC.
COON VALLEY FARMERS TELEPHONE COMPANY, INC.
FARMERS TELEPHONE COMPANY
HILLSBORO TELEPHONE COMPANY
LAVALLE TELEPHONE COOPERATIVE
MONROE COUNTY TELEPHONE COMPANY
MOUNT HOREB TELEPHONE COMPANY
NORTH-WEST CELLULAR, INC.
RICHLAND-GRANT TELEPHONE COOPERATIVE, INC.
VERNON TELEPHONE COOPERATIVE
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September 7, 1994

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

SHARON JANE LUNDGREN, Plaintiff and Respondent, v. JAMES W. WELCH et al., Defendants and Appellants; TELEPHONE AND DATA SYSTEMS, INC., Intervener and Appellant.	A051386 San Francisco Co. Super.Ct.No. 911761

Plaintiff-respondent Sharon Jane Lundgren is fighting for control of defendant-appellant Volcano Communications Company (VCC) against intervener-appellant Telephone and Data Systems, Inc., (TDS) and against Lundgren's parents, her brother and his wife (collectively the Welches), also defendants and appellants. In a previous appeal (Lundgren v. Welch, A050628, filed July 29, 1991 [hereafter Lundgren I]), we affirmed the confirmation of an arbitration award determining that Lundgren had a contractual right to buy the Welches' VCC shares. In this appeal we review the superior court's grant of a preliminary injunction which ordered the corporate status quo preserved while Lundgren and TDS dispute their rights to the Welches' stock. We affirm.

Lundgren, her husband and children own approximately 17.5 percent of the VCC stock. Prior to October 1989, her father and mother (the senior Welches) owned about 20 percent, and her brother and his wife (the junior Welches) another 17.5 percent. All the Lundgren and Welch shares were subject to a transfer restriction agreement which gave each party a right of first refusal when any of them proposed to sell stock outside of the family. In October 1989 the Welches agreed to sell all their shares to TDS, a Chicago-based telecommunications company. The senior Welches' shares were actually transferred to TDS; the junior Welches' shares were to be transferred when regulatory approval for a change of control was obtained. TDS also bought stock from other shareholders (the Smiths) not subject to the restriction agreement. Lundgren and the junior Welches each have 17.5 percent, and the remaining 16 percent is owned by the Smiths.

Lundgren filed a demand for arbitration under the restriction agreement on October 5, 1989, five days before execution of the Welch-TDS sale agreement. (Lundgren I, supra, at p. 2.) She filed this action for injunctive relief on October 12, seeking to prevent TDS from taking control of VCC "[p]ending a final decision by the arbitrator." On June 5, 1990, the arbitrator ruled that the Welch-TDS sale violated the contract formed by Lundgren's exercise of her right of first refusal, and was "null and void" under the restriction agreement. TDS intervened in this action on July 2, 1990,

seeking a declaration that it, rather than Lundgren, had the right to purchase the Welch shares.

On June 29, 1990, TDS proposed to the VCC Board of Directors that VCC sell to TDS certain authorized but unissued VCC stock, thereby allowing TDS to obtain a controlling interest even if Lundgren ultimately obtained all the Welch stock. As an alternative, TDS proposed that VCC be combined with a TDS subsidiary. These proposals were discussed at a board meeting on July 2 and were referred for evaluation to a three-person "special committee" which had been formed to direct the present litigation.

Lundgren obtained a temporary restraining order and, on August 17, 1990, this preliminary injunction, to prevent VCC from acting on the TDS proposals. The preliminary injunction forbids the Welches and VCC from: changing the officers or directors of VCC; spending or borrowing money, or entering into any agreements, other than in the ordinary course of business; selling or giving as security any VCC property; increasing salaries to shareholder-employees; paying any extraordinary dividends; transferring any VCC stock; or doing anything which would prevent Lundgren from buying the Welch shares and thereby obtaining control of VCC.

Two inquiries govern a trial court's decision on whether to issue a preliminary injunction. "'"The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is

likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued. [Citations.]" . . . '"[By] balancing the respective equities of the parties, [the trial court] concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him."' [Citation.]" (American Academy of Pediatrics v. Van de Kamp (1989) 214 Cal.App.3d 831, 837.) We review the trial court's determination only for abuse of discretion.

Likelihood of Success on the Merits

The parties appear to assume that "success on the merits" for Lundgren will include retrieving the senior Welches' stock from TDS, and/or actually purchasing all the Welch stock and gaining control of VCC. We will assume the same for purposes of analysis, although as far as this record shows Lundgren has not so far actually sought injunctive relief which would produce either of these effects.

It is reasonably likely that Lundgren will ultimately succeed in having the Welch-TDS agreement rescinded and the senior Welches' stock returned to them. The arbitrator declared that sale null and void under the restriction agreement, but could not grant any further relief because TDS was not a party to the arbitration. The Welch-TDS agreement was executed after Lundgren had filed for arbitration and in full awareness of the pending controversy. The agreement

itself recites a mutual belief that Lundgren's claim was without merit, an assumption whose defeat may provide grounds for rescission. TDS expressly promised to reconvey the senior Welches' shares "upon appropriate order."

A judgment confirming an arbitration award has the same force and effect as a judgment in a civil action, including the same collateral estoppel effect. (Code Civ. Proc., § 1287.4; Sartor v. Superior Court (1982) 136 Cal.App.3d 322, 328.) As a successor in interest who took the property at issue after commencement of the arbitration proceeding, TDS will likely be found to be bound by the arbitrator's decision, and hence barred from relitigating the issue of the Welch-TDS sale's validity. (Code Civ. Proc., § 1908, subd. (a)(2); Loving & Evans v. Blick (1949) 33 Cal.2d 603, 612.) In addition, TDS paid the Welches' legal costs for the arbitration, confirmation action and appeal, and TDS attorneys participated in preparing the defense. While this falls short of control over the action such as would bring TDS within subdivision (b) of Code of Civil Procedure section 1908, together with TDS's financial and property interest it creates a likelihood TDS will be found "sufficiently close" to the arbitration as to be fairly bound by the results of that proceeding. (See Aronow v. LaCroix (1990) 219 Cal.App.3d 1039, 1048-1049.)

It is not certain that rescission of the Welch-TDS sale will allow Lundgren to obtain control of VCC. The preliminary injunction simply returns the contestants for